

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-7005

UNITED STATES COURT OF APPEALS

For the Second Circuit

PRESCOTT H. RATHBORNE,

Plaintiff-Appellant,

- against -

CITADEL MANAGEMENT CO., INC., URBAN
RELOCATION CO., INC., EDWIN J. GLICK-
MAN, SALBIAN REALTY CO., INC., SILTAN
DEVELOPMENT CORP., WOAS PROPERTIES
CORP., and MADISON ASSOCIATES,

Defendants-Appellees.

Appeal From a Judgment of the United
States District Court for the Southern
District of New York

Brief of Defendants-Appellees
Glickman, Salbian, Siltan,
and Madison

Nickerson, Kramer, Lowenstein, Nessen,
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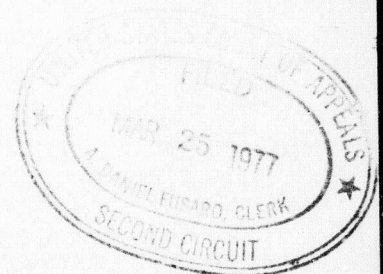
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Docket No. 77-7005

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SALBIAN REALTY CO., INC., SILTAN DEVELOPMENT
CORP., WOAS PROPERTIES CORP. and MADISON
ASSOCIATES,

Defendants - Appellees.

Brief of Defendants-Appellees
Glickman, Salbian, Siltan
and Madison

Preliminary Statement

Defendants-appellees Edwin J. Glickman ("Glickman"),
Salbian Realty Co., Inc. ("Salbian"), Siltan Development Corp.
("Siltan"), and Madison Associates ("Madison") submit this
brief in support of the order of the United States District
Court for the Southern District of New York (Brieant, D.J.)
awarding summary judgment, pursuant to Rule 56 of the Federal
Rules of Civil Procedure, to these defendants (collectively,
with defendant Woas Properties Corp. ("Woas"),* hereinafter

* Summary judgement also was awarded Woas but plaintiff has
withdrawn his appeal as against Woas (A. 228-30).

called "the Madison defendants"), and defendants Citadel Management Co., Inc. ("Citadel") and Urban Relocation Co., Inc. ("Urban").

This is an action which, as the District Court held, has no proper place in the federal courts. Plaintiff is a former residential tenant whose right of occupancy was derived solely from the New York rent control laws. The Madison defendants became the fee owners of plaintiff's building in the course of assembling property for a possible redevelopment project. This action is the latest in a series of proceedings (see pp. 16-17, infra) in which plaintiff has sought to recover damages from various parties by contending that he was wrongfully forced to vacate his apartment in 1972 as a result of the assemblage. In this action plaintiff seeks \$5,450,000 in compensatory and punitive damages on his claim, labelled "harassment" in the complaint (A. 15, ¶10) but "nuisance" on this appeal, that the Madison defendants, in order to facilitate their redevelopment project, wrongfully forced plaintiff to vacate his apartment by rendering it uninhabitable. Had this alleged conduct occurred, and however labelled, it would have been in plain violation of the city and state rent control laws prohibiting any course of conduct which interferes with or disturbs a tenant's use or occupancy of his or her apartment (see pp. 25-26, infra).

This purely local dispute, here only because plaintiff created diversity jurisdiction by moving to Louisiana

after he vacated his apartment, should have been adjudicated by the local rent control agency. The city and state rent control regulations both declare the conduct alleged by plaintiff to be illegal, and provide a specific damage remedy for any tenant victimized by such conduct ("the rent control remedy"). But that rent control remedy, which the parties agree to be exclusive within its scope (Ptf. brief, pp. 8, 11), required plaintiff initially to submit his grievance to the local rent control agency for its determination. Thus the District Court properly granted defendants summary judgment because of plaintiff's failure to pursue and exhaust this exclusive remedy for the wrong he alleges (see pp.24-37, infra). The District Court also properly granted summary judgment on the alternative ground that the full record demonstrated that the Madison defendants had not engaged in conduct that could reasonably be held wrongful to plaintiff (see pp. 38-50, infra).

Statement of the Issues

1. Was the District Court correct in holding that the rent control remedy, under New York law an exclusive remedy within its scope, was applicable to defendants' alleged conduct and therefore barred this action?

2. In the alternative, was the District Court also correct in awarding defendants' summary judgment on the full record, given that plaintiff, after three years of related litigation and full discovery, failed to come forward with

evidentiary facts rebutting defendants' showing that, inter alia,

- defendants' actual conduct of their assemblage, a proper exercise of their rights and duties as property owners under state law, caused no substantial interference with plaintiff's tenancy;
- defendants' alleged conduct, to the extent denied, never in fact occurred; and
- plaintiff never informed defendants, despite ample opportunity to do so, that any of their alleged conduct, or any conduct by their agents or lessees, was disturbing or damaging him in any manner?

Statement of the Case

Nature of this action

Plaintiff, a bachelor in his late thirties, describes himself as an "interdisciplinary scientist" engaged in "sensory research and development," but his principal means of support is inherited wealth (A. 58-59). In 1965 or 1966, he commenced his tenancy in a modest rent controlled apartment, including an adjacent roof garden, located on the corner of Third Avenue at 200 East 53rd Street (the "building"), on the block bounded by East 53rd Street, East 52nd Street, Second Avenue and Third Avenue (the "block") in Manhattan (A. 32, ¶¶ 1-2, admitted at A. 37).

Madison, a partnership engaged in assembling property on the block for possible future development, purchased the fee title to plaintiff's building on February 5, 1971, through defendant Woas, a nominee company; in 1972 the title was transferred to defendants Salbian and Siltan, also Madison nominees. The fee title was subject, and remained subject throughout plaintiff's tenancy, to a long-term net lease running to 1993 in favor of 873 Third Avenue Corp. ("873 Corp."), an entity controlled by one Sol Garfinkel ("Garfinkel"); in addition, 873 Corp. had sub-leased to 1993 the first floor of the building to a fast food operation by the name of Munchtime U.S.A., Inc. ("Munchtime") (A. 33, ¶5, admitted at A. 37; A. 40-41, 210,).

Plaintiff's amended complaint (A. 14-16) alleges that the Madison defendants, and Citadel and Urban as their agents, engaged in these activities in order "to cause the tenants on the block, including plaintiff, to vacate their premises":

- "tinning and bricking up buildings and windows to give the block an abandoned appearance";
- "posting large and ungainly signs indicating [should be 'indicating'] that the block was being vacated";
- "renting or giving a large number of buildings on the block to drug rehabilitation centers (although the area was not a center of drug addiction) in order to bring unsavory persons to the neighborhood";

- "refusing to re-rent vacated apartments or stores so that the block took on a derelict character";
- "refusing to maintain properties on the block";
- "threatening tenants who refused to vacate with physical and financial injury"; and
- "other diverse improper and illegal means" (A. 15, ¶8).

As a result of defendants' actions, which are alleged to have "constituted harassment of plaintiff by the defendants" (A. 15, ¶10), plaintiff claims "the block became so derelict that it was uninhabitable, and plaintiff was forced to vacate his apartment" (A. 15, ¶9). Damages are sought in the princely sum of \$450,000, including \$100,000 "in psychological damage" (A. 15-16, ¶11).

In a second cause of action, asserted against all defendants except Salbian, Siltan and Woas, plaintiff demands \$5,000,000 in punitive damages based upon this allegation:

"Similar acts to which plaintiff refers in the first cause of action were undertaken by the above defendants for similar purpose against thousands of tenants on this block and on other blocks throughout New York City, causing said tenants great anguish and financial loss" (A. 16, ¶13).*

* Of this second cause of action plaintiff has little to say in his brief and we will do likewise. The second cause cannot stand independently of the first, and would fall even if the first cause were valid: this not being a class action, plaintiff cannot recover damages for alleged wrongs done to other tenants (see p. 19 fn., infra). The allegation is also patently false; the Madison defendants had never been involved in any assemblage "on other blocks" involving tenant relocation (A. 42) and the record is barren of evidence of any wrongful conduct against other tenants on plaintiff's block or on any other (see pp. 19-22, infra).

Prior Proceedings

This action is plaintiff's second federal diversity action in which he has asserted that defendants forced him to v e by their assemblage activities. The first -- Rathborne v. Citadel Management Co., Inc., 73 Civ. 612, S.D.N.Y. ("Rathborne I") -- was discontinued against these defendants without prejudice, upon plaintiff's stipulation that he had been afforded "full and ample discovery" on his claims against them (A. 100; (see p. 14, infra).

When they were again sued in this action the defendants, after answering (A. 17-29), moved for summary judgment (A. 30-140, 206-24) on the basis of the Rathborne I discovery record* and supplemental affidavits. Plaintiff's response to

* The full Rathborne I discovery and trial record was filed in support of the motion in the series of five files described at A. 93, and marked as documents 13 through 17 in the Record on Appeal. That bulky record is marshalled in the principle moving affidavit below, which contains specific citations to each portion of the full record relied upon (A. 51-92). In this brief, where portions of the original record have not been reproduced in the appendix, we will cite to the Record on Appeal by document number ("Record doc."), or to the moving affidavit, which cites to the original record below.

Rathborne I raised the same allegations against the Madison defendants as are asserted here, as evidenced by the complaints in the two actions (compare A. 96-97, with A. 15-16). Siltan, Woas and Madison were not named defendants in Rathborne I, but even before he vacated his apartment in 1972 plaintiff had been aware of their involvement in the assemblage (A. 229). Thus plaintiff's counsel asked several questions of Mr. Glickman, at his Rathborne I deposition, concerning Siltan, Woas and Madison (Record doc. 15, at 5-9, 22-23, 29).

the motion (A. 141-205) failed to meet the requirement of Rule 56 that he come forward with specific evidentiary facts to support his allegations (see pp. 38-40, infra).

Disposition Below

The District Court granted defendants summary judgment on both of the alternative grounds presented in support of the motion. First, the Court held that the rent control remedy was the exclusive remedy available to plaintiff under state law (A. 7-10). Second, the rent control remedy aside, the Court also held, after resolving all doubts or ambiguities in the record in plaintiff's favor (A. 4), that plaintiff had not raised a genuine issue of material fact that defendants had engaged in any conduct that could reasonably be found wrongful to plaintiff (A. 10-13).

Statement of Facts

The holding of the District Court concerning the exclusiveness of the rent control remedy is based upon undisputed facts and issues of law, and thus does not require review of the full record below (see pp. 24-37, infra). The Court's other ground of decision does depend upon a review of the record, however, which we shall summarize here.*

* A full marshalling of the record in support of the motion will be found in the principle moving affidavit below (A. 51-92).

The record demonstrates there is no basis for plaintiff's allegations that defendants engaged in conduct -- whether labelled "harassment" or "nuisance" -- designed to or in fact causing plaintiff to vacate his apartment. Throughout the period of plaintiff's tenancy, Madison held the fee to plaintiff's building subject to the long-term 873 Corp. and Munchtime leases, and thus could not use the site in any development project. Consequently, defendants never had any reason to care in the slightest whether plaintiff remained in tenancy; they never even requested him to vacate, much less tried to force him to do so (A. 40-41). The only harassment campaign existed solely in plaintiff's own vivid imagination, which tied the specific acts which plaintiff suffered at the hands of others to the defendants' assemblage, although in fact it is plain no such connection existed (see p. 18, infra).

-- the Rathborne-Garfinkel
disputes

The origin of plaintiff's present complaint against the Madison defendants is to be found in plaintiff's repeated and heated disputes with Garfinkel and Munchtime. The full (and somewhat ludicrous) course of the Rathborne-Garfinkel/Munchtime disputes need only be highlighted here; a full description will be found in the appendix (A. 60-68).

Plaintiff and Garfinkel had been locked in bitter controversy as early as 1966, well before the defendants' in-

volvement with the block (A. 60-61). The fuel for the bitterness, aside from plaintiff's own contentious personality,* later became the unfortunate placement in the middle of plaintiff's roof garden of two air conditioners which, (i) serviced the Munchtime store, and (ii) frequently malfunctioned. Plaintiff valued his privacy and the Munchtime people valued their comfort. The result was a confrontation whenever the Munchtime people (and Garfinkel) demanded access to plaintiff's roof garden to repair their air conditioners. These recurrent confrontations became "far, far more bitter," says plaintiff, in 1972 (A. 62; Rec. doc. 13, at 259). According to plaintiff, Garfinkel threatened plaintiff with physical violence ("You know, Prescott, one of these days, I'm going to hit you with a bat") and indeed threatened his life on "many, many occasions", if plaintiff would not vacate his apartment (A. 62, 117); the Munchtime employees physically pushed him around (A. 63). While these disputes were raging, plaintiff found his electricity cut off, his apartment door axed and kitchen grease spread upon it (A. 64-65). Plaintiff, a hyper-sensitive individual to begin with who now felt himself under seige, also believed that anonymous people were taunting him or following him on the streets, knocking on his door pretending to bring gifts and throwing things at him (A. 66).

* Judge Solomon, who tried Rathborne I, found that plaintiff was a "very exasperating person" who "continually provoked Garfinkel," while Garfinkel testified that he had often become "livid with rage" against plaintiff (A. 60, 103-04; Rec. doc. 17, at 303, 320).

Plaintiff commenced harassment proceedings (A. 110-17) against 873 Corp. and Munchtime in state Supreme Court and against 873 Corp. in the New York City Housing and Development Administration ("HDA"), Office of Rent Control (the "Rent Control Administration"), the agency responsible by law for initially determining such complaints (see pp. 26-27, infra).^{*} These proceedings led to others by Garfinkel against plaintiff in the Civil Court and Criminal Court, as the two litigated against one another in almost every forum conceivable in the state judicial system (A. 67).

Madison's involvement with the assemblage was public knowledge at least as early as 1970, and plaintiff himself was well aware that Woas, Siltan and Salbian were nominee companies for Madison,^{**} the beneficial fee owner of his building (A. 40; A. 229, ¶¶1-3). At the height of his battles with Garfinkel in mid-1972 -- a period in which plaintiff's psychiatrist and his friends found his thinking "disorganized" with paranoid tendencies (A. 72-73) -- plaintiff began to believe that his troubles with Garfinkel and Munchtime really were part of a

^{*} Eventually the state court denied plaintiff most of the injunctive and declaratory relief he sought in an opinion (A. 114) which called his attention to the available rent control remedy for tenants alleging harassment.

^{**} Madison had acquired properties through nominee companies to try to keep its acquisition costs within reason (A. 40).

harassment campaign directed against him by the Madison defendants, with Citadel and Urban as their agents. Thus in his litigations with Garfinkel plaintiff articulated this belief concerning Mr. Glickman of Madison -- "the real landlord" (A. 112): "the boss was the assembler and everyone else was his minion" (A. 73, 112, 116; Record doc. 13, at 293).

Despite his belief that the Madison defendants were responsible for his troubles, plaintiff neither gave them any notice of that suspicion nor made any request that they either cease any of their own activity or take steps to curb the behavior of anyone else. He specifically refrained from communicating any such notice or request in his one contact with defendants: a meeting with Mr. Glickman in September 1972 (A. 48-49, 125; Rec. doc. 13, at 432, 471-76). The plaintiff admits these facts:

"Throughout his tenancy in the building, plaintiff had no contact or communication with any of the defendants . . . except for one meeting with defendant Glickman on September 7, 1972. At that meeting, plaintiff did not protest or even mention any of the matters which are claimed in the amended complaint to have 'constituted harassment of plaintiff by defendants'" (A. 33, ¶7, admitted at A. 37).

-- the November letter

Meanwhile the Garfinkel/Rathborne battles continued, including plaintiff's harassment proceeding before the Rent Control Administration. Eventually Garfinkel outlasted plain-

tiff. In November 1972, apparently on the advice of his psychiatrist, plaintiff vacated his apartment, thereafter moving to Louisiana. But he left in his wake a letter (Record doc. 14, exh. "2" -- the "November letter"), which he sent to the news media and to his Rent Control Administration hearing officer. The November letter, so contrary to plaintiff's one prior contact with Mr. Glickman, suddenly accused Mr. Glickman and the defendants of having been engaged in a conspiracy to harass plaintiff out of his apartment:

"After years of tolerating your incessant harassment in your attempt to drive me from my apartment at 200 East 53rd Street so that you could build an enormous profitable office building, I am no longer able physically or mentally to bear the continued pressure and, therefore, am forced to leave my apartment at a loss of many scores of thousands of dollars to me" (Record doc. 14, exh. "2," p. 1).

The letter blamed the Madison defendants for Garfinkel's "specific acts against me" -- the door axing and so forth -- as well as for an alleged deterioration of the general conditions on the block resulting from the assemblage.

-- Rathborne I

The letter, apparently written by plaintiff's present counsel (Record doc. 13, at 50-51, 69-70), plainly was designed to justify a litigation. Rather than pursue his Rent Control Administration proceeding -- presumably because he

feared an adverse ruling -- plaintiff next used his newly acquired Louisiana residency to try to convert his grievance into a federal case.* In February, 1973, represented by his present counsel, he commenced Rathborne I (see p. 7, supra) against the addressees of his November letter: Garfinkel, 873 Corp., Mr. Glickman, Salbian, Citadel, Urban and Odyssey House, Inc. ("Odyssey House"), the widely respected drug rehabilitation program which had been allowed by the Madison defendants to utilize some vacant buildings on the block for thrift shops and residential facilities (see pp. 21-22, infra). The complaint (A. 95-99) alleged the same basic melange of general assemblage activities and "specific acts against me" as were asserted in the November letter. Mr. Glickman counterclaimed for libel because of the defamatory character of that November letter.

Discovery was conducted in Rathborne I by all parties and completed by plaintiff, who by this time was represented by new counsel. In August, 1974, plaintiff discontinued the action without prejudice against all defendants except Garfinkel and 873 Corp., stipulating that he had been afforded "full and ample discovery" on his claims against the discontinued defendants (A. 100).

* Plaintiff took no further steps to prosecute his complaint before the Rent Control Administration, which finally dismissed the complaint in November, 1973 (A. 119-20; Record doc. 17, at 162).

Plaintiff proceeded to trial in Rathborne I against Garfinkel and 873 Corp. before visiting Judge Solomon in 1975. At the end of the trial Judge Solomon stated his tentative inclination to rule against plaintiff (Record doc. 17, at 320-25). His federal case thus about to abort, plaintiff, this time again represented by his present counsel, performed a most remarkable about face. He attempted to reopen his abandoned Rent Control Administration proceeding by bringing an Article 78 proceeding in the state courts to compel a further hearing on his claim (A. 118-22).^{*} His present counsel, with the consent of his Rathborne I counsel, then asked Judge Solomon to stay all further proceedings in Rathborne I on the doctrine of primary jurisdiction, pointing out that it was the Rent Control Administration which was expert in, and authorized by statute to determine, complaints of harassment by rent control tenants (A. 123-24). Judge Solomon properly ignored this last minute informal application in his decision ruling against plaintiff rendered in April, 1975 (A. 102-08).^{**}

^{*} Plaintiff's 1975 excuse for not having taken action when the Rent Control Administration had dismissed his proceeding in 1973 was that the letter informing him of the dismissal had not been sent to him, but rather only to the counsel who represented him in the proceeding when commenced in 1972 (and who represents him now), but who did not represent him in 1973 (A. 119, ¶11)!

^{**} Judge Solomon viewed plaintiff's "harassment" claim against Garfinkel and 873 Corp. to sound in "constructive eviction," but found that defendants' acts were not sufficient to constitute constructive eviction, and that plaintiff had failed to vacate within a reasonable time of the acts of which he complained. Judge Solomon also stated, although not on the basis of any facts we find in the trial transcript, and indeed contrary to plaintiff's own testimony (Record 17, at 43, 60), that plaintiff had vacated his apartment because of the assemblage had changed the character of the block (A. 105).

-- this action

Plaintiff appealed Judge Solomon's decision to this Court, and, in the meantime, in May, 1975, commenced this action. The initial complaint (A. 225-27) named as defendants Citadel, Urban, Glickman and Salbian; the following month he amended the complaint (A. 14-16) to add defendants Siltan, Woas and Madison, without changing the substance of the complaint. Again, the same acts as alleged in the Rathborne I complaint relating to the assemblage are asserted against Citadel, Urban and the Madison defendants. The only meaningful variations from the Rathborne I complaint (A. 95-99) are contractions: this time plaintiff has not joined Odyssey House as a defendant, and does not allege, at least not explicitly, "the specific acts against me" (November letter) to be the responsibility of these defendants.

Thus the current action is the latest of many by plaintiff alleging that wrongful conduct by someone forced him to terminate his troubled tenancy. From the state court, plaintiff has fled to the Rent Control Administration, then to federal court, then back to state court, and now back again to federal court, abandoning one forum for another whenever faced with defeat in his most recently chosen forum. The checkered procedural history of plaintiff's grievance had resulted in the simultaneous pendency of three proceedings when defendants

filed their motion below: the state Supreme Court was deciding whether plaintiff could revive his proceeding before the Rent Control Administration, this Court was deciding the remnants of Rathborne I, and the District Court was addressing defendants' motion in this action. Ultimately, this Court affirmed Rathborne I* summarily without opinion, and the Supreme Court ruled against plaintiff's attempt to reopen the Rent Control Administration proceeding. Plaintiff, a "career litigant"*** to the end, fights on. He is prosecuting not only this appeal, but, he tells us, also an appeal from the adverse state court ruling (Ptf. brief, p. 11).

-- the Madison defendants:
their alleged conduct
which did not occur

Plaintiff's choice of defendants has been no more constant than his choice of forum. Plaintiff has contended he was forced to vacate his apartment by the acts committed by Garfinkel and 873 Corp. in his testimony under oath at the Rathborne I trial,*** in his brief to this court in the Rathborne

* Rathborne v. Garfinkel, et al., Dkt. No. 75-7313 (2d Cir. Dec. 3, 1975).

** Thistlethwaite v. City of New York, 497 F.2d 339, 342 (2d Cir.), cert. denied, 419 U.S. 1093 (1974).

*** Plaintiff testified in Rathborne I that he would not have left his apartment "for the rest of my life," except for the acts by Garfinkel and the 873 Corp. proven at the trial (Record doc. 17, at 60), and that the neighborhood had not deteriorated materially from 1967 to 1972 (Record doc. 17, at 43).

I appeal,* and in his sworn affidavit filed in 1975 in one of his state proceedings.** Plaintiff, or at least his counsel, has been convinced by the Rathborne I discovery that plaintiff was mistaken in his 1972 suspicion that the Madison defendants were directing or inspiring those acts by Garfinkel (Ptf. brief, p. 5). Stripped of that suspicion, nonetheless plaintiff here seeks to proceed on the inconsistent argument that it was really the assemblage activities that forced him to vacate, not the Garfinkel acts. Whatever the true inner workings of plaintiff's mind, no reasonable and normal person would have been driven from plaintiff's apartment by those few activities of defendants alleged by plaintiff that in fact occurred.

Urban and Citadel were retained by the Madison defendants, through standard form agreements (A. 197-98), to manage their properties on the block and to assist in tenant relocation. But the parties agree that Urban and Citadel performed no maintenance or relocation services concerning plaintiff's building because of the long-term 873 Corp. lease (A. 207), and plaintiff admits that he had no contact of any

* "Finally in November, 1972, because of the harassment of Garfinkel and 873 [Corp.] plaintiff-appellant was driven to vacate his apartment" (Rathborne v. Garfinkel, Dkt. No. 75-7313, brief of plaintiff-appellant at 3).

** Plaintiff swore that it was "as a result of this harassment" by 873 Corp., the subject of his Article 78 proceeding, that "I was forced to vacate the apartment in November of 1972" (A. 119, ¶8; see A. 120, ¶12).

sort with Citadel or Urban throughout his tenancy (A. 76). Plaintiff charges that Urban and Citadel, in performing their services for Madison in other buildings on the block, failed to maintain the buildings, made threats against tenants and otherwise attempted to harass them to vacate their apartments (A. 15, 18). But plaintiff -- who in any event cannot recover damages for any wrongs done to other tenants* -- did not come forward in the Rathborne I discovery or on the motion below with any evidence to rebut defendants showing that no such conduct occurred; not even a single instance of such conduct is made out in plaintiff's papers, and thus the District Court properly ruled these allegations "unsupported" (A. 5).

-- defendants' alleged conduct which did occur: the policy of not re-renting; signs and tinning

Defendants did take actions normal to any assemblage, and in no manner harmful or wrongful to plaintiff. They declined to re-rent vacant apartments to save management expenses in these buildings they soon planned to demolish (A. 43-44). They posted a few signs, announcing that policy

* "[A] tort committed against one person furnishes no cause of action in favor of another." Patrick v. Esso Standard Oil Co., 156 F.Supp. 336, 341 (D.N.J. 1957). See Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc.2d 1, 7 (Sup.Ct. N.Y. Co. 1968), aff'd, 32 App. Div.2d 892 (1st Dep't 1969) (mem.); cf., e.g., McCabe v. Atchison, Topeka & Santa Fe Railway, 235 U.S. 151, 162 (1914) ("It is the fact, clearly established, of injury to the complainant -- not to others -- which justifies judicial intervention").

and Urban's relocation services,* which were held specifically lawful by the New York Courts.** Finally, vacant buildings were secured with tin to comply with the local law mandating that vacant buildings be sealed if not "continuously guarded."*** None of these activities, of course, affected plaintiff's building in the least given the long-term commercial leases (A. 42-45).

* This is plaintiff's description of the signs:

"Signs began to go up approximately in the Spring of 1971 on 52nd Street, 53rd Street and Third Avenue. By November, 1972, there were approximately three large signs on 53rd Street, one large sign on 52nd Street and two or three large signs on Third Avenue."

"The signs contained the names Citadel and Urban and a message about relocation. The signs were approximately five feet long and three feet wide" (Answers to Citadel and Urban Interrogatories in Rathborne I, nos. 6 and 7) (A. 77).

** Plaintiff disingenuously cites (Ptf. brief, p. 14) and presents (A. 196) a building violation issued for one of the signs (for want of a construction permit), but does not inform the Court that the violation was found invalid on the merits after trial (see Record doc. 32, exh. "M").

Urban also prevailed in litigation turning on whether the signs complied with the statutory requirement, N.Y. Bus. Corp. Law §302(b)(1) (McKinney Supp. 1976), that they contain the words "not a governmental agency," apparently to prevent any impression to the contrary from Urban's name. People v. Urban Relocation Co., 40 App. Div.2d 598 (1st Dep't 1972) (per curiam), aff'd, 33 N.Y.2d 553 (1973) (no opin.). Plaintiff has reproduced in the appendix (A. 188) the contrary lower court decision, without informing this Court of the reversal on appeal.

*** The Administrative Code of the City specifically requires as follows:

". . . A vacant building which is not continuously guarded shall have all openings sealed in a manner approved by the commissioner [of Buildings], and it shall be the duty of the owner thereof promptly to make any repairs that may be necessary for the purpose of keeping such building sealed. . . ." 3 N.Y.C. Admin. Code §C26-80.0 (Williams 1974).

-- Odyssey House

Plaintiff also complains -- as he never did to the defendants throughout his tenancy (see p. 12, supra) -- of the provision of free space to Odyssey House for its drug-free rehabilitation program in certain vacant buildings on the block, including the one next to plaintiff's. As plaintiff admits (A. 35, ¶16, admitted at A. 37), Mr. Glickman was actively involved with the Odyssey House program as a member of its Board of Advisors, and, when able, made available vacant buildings to Odyssey House not only in the block in question but at other locations (A. 45-46, 224). That the public policy of New York is furthered by Odyssey House's well recognized rehabilitation program is manifest from the funding it receives from the State (A. 79) and from New York's statutory policy favoring rehabilitation programs for narcotics addiction. E.g., N.Y. Mental Hygiene Law, §§1.03, 81.01 (McKinney 1976).

Extensive discovery was conducted in Rathborne I concerning the nature of the Odyssey House facilities on the block and the manner in which they were conducted. The facts developed showed that the facilities were properly maintained and limited in scope; the total Odyssey House personnel on the block numbered 80 persons, of whom only 30 were patients, and no patient was maintained on drugs (A. 80).*

* Odyssey House maintained two small patient residences on 52nd Street, and a staff residence next to plaintiff's building. The other of the so-called "large number of drug rehabilitation centers" (Ptf. brief, p. 3), were in fact well maintained thrift stores, and an information center, on Third Avenue (A. 80), a busy commercial artery.

Plaintiff's specific complaints against Odyssey House are limited to isolated instances in which he says Odyssey House people directed comments he took as innuendos at him, and other instances where objects fell near plaintiff on his roof garden which he believed came from the Odyssey House building next door -- although in fact he never saw anyone throw the objects and they could have easily been thrown from the street (A. 80-81).

Plaintiff also complains that in the 1970 to 1972 period congestion greatly increased on 53rd Street and that dope addicts or derelicts were found from time to time in the hallway of his building, which Garfinkel failed to secure (A. 111-112). But plaintiff admits he cannot attribute such persons to Odyssey House (A. 81-82). The Madison defendants showed that in fact any derelicts or dope addicts were attracted by a poorly supervised methadone clinic operated across the street from plaintiff's building, entirely out of the Madison defendants' control or ownership (A. 83). Plaintiff responded with no evidence refuting this proof.

In an apparent effort to excuse his failure to come forward with evidentiary facts as required by Rule 56, plaintiff suggests his Odyssey House charges are colorable by claiming that similar charges were "investigated by," or "caused great concern to" state and local officials (Ptf. brief, pp. 4, 14, 19). But plaintiff adduced no facts relating to the block

developed out of any such concern or investigation, and the incompetent materials he did submit indicate what is the fact: that no allegations, much less any findings of wrongdoing, were made concerning the Odyssey House facilities on the block, which were located only in entirely vacant buildings (A. 194, 207-08, 222-23).*

But if, in fact, there were any question about the "lawlessness" (Ptf. brief, p. 14) of any aspect of the assemblage -- whether defendants used "illegal means" or "illegal ends," as the complaint alleges (A. 15, ¶8) -- the laws involved were the very rent control regulations which provided plaintiff with the remedy for his own grievance (see pp. 31-32, infra). We will now show that the District Court was correct in ruling that plaintiff's decision to evade that remedy bars this action.

* Mr. Glickman initially did think that a reported investigation by the Attorney General concerning Odyssey House was meant to or might be extended to include its facilities on the block, and was moved to write a strong letter to Odyssey House (Record doc. 32, Exh. "G", last two pages), advising that it would have to leave the block because the allegations -- even though totally untrue -- would damage the Madison defendants' relations with community groups and others. However, the Attorney General soon clarified that his investigation was concerned only with the placement of patients in "occupied residential structures," and that he saw no objection to Odyssey House's use of entirely vacant buildings (A. 194). With this clarification, Odyssey House was permitted to remain on the block -- where it occupied only vacant buildings -- without further incident (A. 222-23).

Argument

Point I

THE RENT CONTROL REGULATIONS
PROVIDED THE EXCLUSIVE REMEDY FOR
PLAINTIFF'S ALLEGED GRIEVANCE, AND
PLAINTIFF CANNOT EVADE BY THIS AC-
TION HIS DUTY TO EXHAUST THAT REMEDY

As a rent control tenant, plaintiff's right to remain in possession of his apartment was derived entirely from the rent control statutes and regulations. E.g., Wasservogel v. Meyerowitz, 300 N.Y. 125, 132 (1949). Those statutes and regulations also provide the exclusive remedy for a deprivation of that statutory right to possession by a wrongful course of conduct -- whether labelled "harassment" or otherwise* -- and that remedy requires the tenant initially to seek an administrative determination that the wrongful conduct has occurred. Since plaintiff failed to secure that determination and thus exhaust this rent control remedy -- his time to do so has long since expired -- his suit here is barred.

*We generally use the word "harassment" to describe plaintiff's grievance and the rent control remedy, since that is the label plaintiff used in reference to the Madison defendants' alleged conduct in the November letter (see p. 13, supra), the Rathborne I complaint (A. 97-98), and the complaint in this action (A. 15, ¶ 10). But it is of no legal consequence if now plaintiff wishes to deny his complaint and contend "we are not dealing with acts of harassment, but of nuisance . . ." (Ptf. brief, p. 12). The alleged course of conduct does not change with the label adopted, and the rent control remedy plainly extends to any such course of conduct however labelled (see pp. 25-26, 36-37, infra).

The comprehensive rent control regulations and the specific remedy available to plaintiff

Pursuant to authorizing state* and local statutes,** the New York City Housing and Development Administration ("HDA"), by its Department of Rent and Housing Maintenance, Office of Rent Control (the "Rent Control Administration"), has enacted its comprehensive Rent and Eviction Regulations (the "Regulations") governing the rights of tenants in apartments subject to rent control (printed at 65 Consol. Laws of N.Y. 463-586 (McKinney 1974)). The Regulations deal with every aspect of the statutory tenancy including, it might be noted, the right of an owner-developer, such as Madison here, to secure a certificate authorizing the eviction of tenants for the purpose of demolishing its building and erecting a new structure (Regulations §58).

Regulations largely adopted in 1971, pursuant to the legislation instituting "vacancy decontrol" (N.Y. Sess. Laws 1971, chaps. 371-74), expressly and exhaustively cover the subject matter of plaintiff's complaint here: wrongful conduct which forces or is designed to force

* N.Y. Unconsol. Laws §§8601-17 (McKinney 1974) (Local Emergency Housing Rent Control Act).

**7 N.Y.C. Admin. Code §§Y51-1.0 - Y51-18.0 (Williams 1975) (New York City Rent and Rehabilitation Law), also printed at 65 Consol. Laws of N.Y. 371-462 (McKinney 1974).

tenants to vacate rent controlled apartments. First, this basic prohibition is declared:

"It shall be unlawful for any person, with intent to cause any tenant to vacate housing accommodations, or to surrender or waive any rights of such tenant under the Rent [and Rehabilitation] Law or these Regulations, to engage in any course of conduct (including, but not limited to, interruption or discontinuance of essential services) which interferes with or disturbs or is intended to interfere with or disturb the comfort, repose, peace or quiet of such tenant in his use or occupancy of the housing accommodations" (Regulations §61b).*

Next, the Administrator of HDA (the "Administrator"), charged with the duty of enforcing the Regulations, is given the power to seek injunctive relief, to impose certain civil administrative penalties, and to certify facts to the District Attorney for criminal proceedings, based on a determination that such conduct is occurring or has occurred (Regulations §§70-72, 74). Finally, the Regulations authorize a civil action by any tenant who has vacated his or her apartment, as plaintiff claims he did,

"because the landlord or any person acting on his behalf, with intent to cause the tenant to vacate, engaged in any course of conduct (including but not limited to, interruption or discontinuance of essential services) which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use and occupancy of the housing accommodations" (Regulations §78b).

*The language is taken from similar provisions in the authorizing statutes. N.Y. Unconsol. Laws §8609(d) (McKinney 1974); 7 N.Y.C. Admin. Code §Y51-10.0(d) (Williams 1975).

However, before this civil action may be commenced in the courts, the (former) tenant must first apply to the Administrator -- "within ninety days" of the tenant's vacating of the apartment -- for a determination that such a wrongful course of conduct indeed occurred, and that the tenant vacated the apartment "as a result of" that conduct (Regulations §78b). If the Administrator's determination is in the tenant's favor, then -- and only then -- the tenant may bring his civil action for damages "within one year of the determination" (Regulations §78b). The tenant likely will prevail in the civil action in view of the "limited jurisdiction of the courts in reviewing" the Administrator's determination. Breger v. Macri, 34 N.Y.2d 727, 728 (1974), reversing, 42 App.Div.2d 533 (1st Dep't 1973). The court determines the damages, which are trebled, in accordance with the standards contained in the Regulations (§78b).*

The Administrator's initial jurisdiction over plaintiff's grievance was exclusive**

The law in New York is clear: the jurisdiction of the Administrator "is exclusive," with respect to en-

* If the administrative determination is adverse to the tenant, the remedy is a "protest" to Commissioner of the Department (Regulations §91a). The filing and determination of the protest is a "prerequisite" (Regulations § 102) to obtaining judicial review of the adverse determination. 7 N.Y.C. Admin. Code §§Y51-8.0, 9.0a(1) (Williams 1975). These judicial review procedures of the Regulations provide the exclusive form of review available. See Montalbano v. DeLuzio, 39 Misc.2d 834 (Sup.Ct. App.T. 2d Dep't 1963).

** This argument turning on the Administrator's jurisdiction was never raised at the trial in Rathborne I and thus Judge Solomon did not consider the question.

forcement of the rights of rent control tenants relating to their tenancy, when the administrative "remedies available are reasonably adequate." Barbee v. 2639 Corp., 284 App.Div. 298, 301 (1st Dep't 1954); see, e.g., Elkort v. 490 West End Ave. Co., 38 App.Div.2d 1, 3 (1st Dep't 1971). With respect to damage actions the law goes further: absent a statutory damage remedy for a wrong terminating his or her tenancy, a rent control tenant has no remedy "at all." Rosner v. Textile Binding & Trimming Co., 300 N.Y. 319, 324 (1950) (fraud cause of action dismissed); see, e.g., Drinkhouse v. Parka Corp., 3 N.Y.2d 82 (1957) (wrongful dispossession); Schwartz v. Sterling Drug, Inc., 300 N.Y. 493, 494 (1949) (cause of action for unlawful attempts to evict plaintiffs, which attempts were "malicious and intended to injure" plaintiffs, dismissed); David v. Fayman, 273 App.Div. 408 (2d Dep't), aff'd, 298 N.Y. 669 (1948) (causes of action for fraud, deceit and conspiracy to defraud dismissed, given absence of legislative sanction for the action); Uberman v. Lasner, 55 Misc.2d 1027, 1030-31 (Sup.Ct. Kings Co. 1968) (tenant's cause of action for abuse of process, alleging landlord had sued him solely "for the purpose of harassment," dismissed since not authorized by the rent control statutes); Johnson v. Dennett, 26 Misc.2d 218 (Sup.Ct. Kings Co. 1960) (common law action for dispossession dismissed). Certainly this is the law with respect a claim based, as is plaintiff's, on a wrongful actual or constructive dispossession:

"Without a provision granting damage for the removal of a statutory tenant there is no remedy, and, where such a statute exists, the remedy can be only that which the statute prescribes."
Drinkhouse v. Parka Corp., 3 N.Y.2d 32, 88 (1957).

But although plaintiff's action would thus be barred even absent a statutory remedy, we need not go so far. Rather, we need only say plaintiff is barred here because he failed to pursue the statutory remedy that was available for the wrong plaintiff claims. Indeed, the rent control remedy has been invoked against exactly the wrong plaintiff asserts here: wrongful conduct against tenants by developers seeking to assemble a plot for future development. Felin Assoc., Inc. v. Altman, 41 App.Div.2d 825 (1st Dep't 1973), aff'd, 34 N.Y.2d 895 (1974) (harassment consisting of failure to provide maintenance and services).*

The District Court's recognition of the exclusiveness of the rent control remedy within its scope, applying the above New York case law, properly respected the legislative intent apparent from the detailed statutory scheme for the resolution of rent control harassment claims, including

* By coincidence, there is a reported case in which a tenant who lived one block away from plaintiff successfully obtained a determination of harassment from the Administrator in March, 1972, the very period when plaintiff claims defendants were conspiring against him. Breger v. Macree, 42 App.Div.2d 533 (1st Dep't 1973), rev'd, 34 N.Y.2d 727 (1974).

the compulsory initial determination by the expert Administrator.

As a New York court has pointed out in an analogous context:

"[T]he whole scheme of the rent control laws and regulations contemplates that the Administrator shall administer them and shall make the appropriate decisions, subject to judicial review, rather than having the court in the first instance make the determination." Gabel v. Eichner, 38 Misc.2d 844, 849 (Sup.Ct. N.Y.Co. 1963).

The Administrator's initial jurisdiction insures that the HDA's expertise in the workings of the complex rent control system will be brought to bear on the grievance at the outset, and that resolution of the grievance will accord with the legislature's own balancing of the interests of tenants and landlord/developers.* This Court has recognized the state's interest in securing adherence to its prescribed rent control administrative procedure by barring assertion of even federal constitutional claims for failure to exhaust these administrative remedies. Eisen v. Eastman, 421 F.2d 560, 567-68 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970) (landlord may not challenge rent level determination under

* Plaintiff, when it was in his interest to so argue, indeed requested that Rathborne I be stayed, pending resolution of plaintiff's harassment proceeding against 873 Corp. before the Administrator, on the ground that plaintiff's claim "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . ." (A. 123, quoting United States v. Western Pac. R.R., 352 U.S. 59 (1956)). But plaintiff erred in invoking this primary jurisdiction doctrine, applicable only where a claim "is originally cognizable in the courts . . ." (Ibid.), since the rent control remedy is one "cognizable in the first instance by an administrative agency alone." United States v. Western Pac. R.R., 352 U.S. 59, 63 (1956).

federal civil rights act (42 U.S.C. §1983), since he had failed to exhaust the available administrative protest of the determination).*

The wisdom of the state rule requiring initial adjudication of rent control grievances by the expert Administrator is well illustrated by plaintiff's contentions on this appeal. For example, plaintiff claims that HDA had been concerned about the "lawlessness" of the Madison defendants' conduct, and urges that such concern "could create an inference of illegality" warranting judgment in plaintiff's favor (Ptf. brief, p. 14). But the only conceivable violation of law would be of the same Regulations which create the rent control remedy available before HDA which plaintiff failed to pursue. Thus plaintiff asks the federal courts to review whether a violation of the Regulations occurred and cites as his "evidence" an

* The Court quoted with approval this law review commentary:

"A strong state interest [in requiring exhaustion of its administrative remedies] is reflected in the establishment of a comprehensive scheme of regulation; authority over the subject matter of the dispute has been vested in an expert supervisory body, far more familiar than a federal court with local factors that legitimately affect administration. . . ." (421 F.2d at 567-68 n. 11, quoting Note, Exhaustion of State Remedies Under the Civil Rights Act, 68 Colum.L.Rev. 1201, 1206 (1968)).

See also e.g., Bindczyck v. Finucane, 342 U.S. 76, 83 (1951) (detailed federal statutory provisions found to be "a self-contained, exclusive procedure"); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 720 (1967); Switchmen's Union v. National Mediation Board, 320 U.S. 297, 301 (1943).

alleged concern by HDA, having failed to exhaust the remedy available before that very agency for the very violation of law about which he claims the agency was "concerned." A more callous disregard of state administrative procedure, and a more egregious waste of the federal courts' time, would be hard to imagine.

The rent control remedy
was applicable to
plaintiff's grievance

Plaintiff now appears to concede that the rent control remedy is exclusive within its scope,* but he attempts to define its scope so narrowly, by a series of technical and illogical arguments, as to exclude from it his grievance against defendants. First, plaintiff argues, contrary to his position for the past five years, that he was not truly and totally a rent control tenant because "half of the premises plaintiff was forced to vacate had been decontrolled" (Ptf. brief, p. 7). This is not so, for plaintiff admits that the alleged September 1972 decontrol order had not become final -- indeed plaintiff was actively contesting it (Record doc. 14, exh. "65") -- up to the point he vacated (A. 159). Thus even as to that half of his apartment plaintiff had continued in occupancy solely under protection of the rent control laws, and the rent control remedy remained fully applicable.

* "To the extent [plaintiff] could obtain a remedy at [the] ... administrative agency, he did not have a right to bring a legal action for the same relief in the courts" (Ptf. brief, p. 11). Plaintiff dismissed his appeal against one of the Madison defendants -- Woas -- which acted only as nominee fee owner of plaintiff's building (A. 228-30).

In addition, plaintiff simply cannot now deny that his tenancy was pursuant to the rent control laws alone. His complaint alleges that "plaintiff was a tenant in a rent controlled apartment" until he vacated (A. 14), and on the motion below plaintiff admitted the truth of the following statement by the defendants:

"Plaintiff's right to continue in possession of his apartment, after his initial lease or leases expired, was derived solely from the rent control laws and regulations of the State and City of New York" (A. 32, ¶2, admitted at A. 37) (emphasis added).

Perhaps plaintiff can argue positions here inconsistent with his discredited Rathborne I-testimony (Ptf. brief, p. 7). But he cannot admit a fact for purposes of the summary judgment motion in the District Court, and then argue here that the motion was wrongly decided since the admitted fact was untrue (which it was not). This "hot and cold" plaintiff cannot blow. Cf. Callanan Road Co. v. United States, 345 U.S. 507, 513 (1953) (estoppel arising from prior inconsistent statements).

Plaintiff also quarrels with the District Court's finding that the Madison defendants, as fee owners of his building, were within this definition of "landlord" in the Regulations:

"An owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use and occupancy of any housing accommodation or any agent of any of the foregoing" (Regulations §2h).

Plaintiff argues that fee owners are not landlords unless they are "entitled to receive rent for the use and occupancy of any housing accommodation" (Ptf. brief, p. 8). But that very construction of the Regulations has been rejected by the state courts: the phrase "entitled to receive rent," etc., does not modify the word "owner," and thus even an owner not entitled to receive rent directly from the tenant nonetheless is a "landlord" within the meaning of the Regulations. Gabel v. Eichner, 38 Misc.2d 844, 847 (Sup.Ct. N.Y.Co. 1963);* see Reichman v. Brause Realty, Inc., 34 App.Div.2d 338, 342 (1st Dep't 1970) (owners of building properly joined as defendant "landlords" in tenant harassment proceeding). The facts alleged by plaintiff -- an owner (not entitled to receive rent) motivated to harass a tenant to assist an assemblage of which the tenant's building was a part -- indeed shows the wisdom of the state courts' reading of the Regulations.

In the alternative plaintiff argues that only Woas, Siltan and Salbian -- the nominee companies who held the fee title for Madison -- but not Madison (including partner Glickman), the beneficial fee owner, should be regarded as within the landlord-owner definition. Plaintiff urges that the defendants should be estopped from asserting the plain fact, as plaintiff admits (Ptf. brief, pp. 10-11), that the

* Plaintiff's brief (p. 8) purports to accept Gabel, but then ignores its holding.

nominee companies indeed were nominees for Madison. But plaintiff cannot establish the necessary elements of an estoppel: a statement or conduct by defendants on which plaintiff relied in changing his position to his detriment. E.g., Lynn v. Lynn, 302 N.Y. 193, 205, cert. denied, 342 U.S. 849 (1951). Plaintiff has admitted that he was fully aware, before he vacated, that Madison and Mr. Glickman were the beneficial owners of the fee -- "the real landlord" -- and that Woas, Siltan and Salbian acted only as Madison's nominees (see p. 11, supra). Plaintiff avoided pursuing his rent control remedy against all the Madison defendants not because he was unaware of their fee ownership of plaintiff's building, but rather because of his conscious litigation strategy to evade the Administrator's jurisdiction.

But in any event this argument distinguishing the Madison defendants* is irrelevant to the applicability of the rent control remedy. Even if Madison and Mr. Glickman were not themselves within the "landlord" definition, they clearly were subject to the rent control remedy since it extends to conduct by the landlord "or any person acting on his behalf" (see p. 26, supra). The whole gist of plaintiff's complaint is that all defendants acted together -- they "conspired among themselves" (A. 15, ¶8).

* Compare plaintiff's admission below that "the Madison defendants acquired the fee title" to plaintiff's building (A. 33, ¶ 4, admitted at A. 37).

Finally, plaintiff urges that the course of conduct he alleges does not fall within the rent control remedy because it concerns conduct which did not occur within plaintiff's building, but rather only on other properties within the block. But the applicable Regulation squarely covers the conduct which plaintiff alleges, i.e., that defendants engaged in a course of conduct "to cause tenants on the block, including plaintiff, to vacate their premises" and that as a result of that conduct "plaintiff was forced to vacate his apartment . . ." (A. 15, ¶8; Ptf. brief, p. 3), which had become "uninhabitable" (A. 15, ¶9; Ptf. brief, p. 6). The rent control remedy extends to "any course of conduct" undertaken to cause the tenant to vacate,

"which interfered with or disturbed or was intended to interfere with or disturb the comfort, repose, peace or quiet of the tenant in his use and occupancy of the housing accommodations..." (see p. 26, supra).

The Regulation draws no distinction between conduct occurring within the four corners of the tenant's building and conduct occurring outside the building but nonetheless interfering with the tenant's use and occupancy.* Plaintiff advances no reason for drawing such a distinction, which of course would open a wide loophole in the Regulation for abuse by any landlord

* Of course, the fact that the actions did not involve plaintiff's building, and thus had no more than a trivial impact upon plaintiff, is one reason why he has no claim for relief on the merits, rent control remedy aside (see pp. 41-43, infra).

desiring to take advantage of it. It is the nature of defendants' alleged conduct and its effect on the tenancy, and not where the conduct occurred, that renders plaintiff's complaint within the scope of the rent control remedy.*

Of course, even if plaintiff had believed meritorious his various arguments here that the rent control remedy did not extend to his grievance against these defendants, he could have and should have presented those arguments initially to the Administrator for resolution.** His decision to bypass the Administrator has needlessly inflicted upon the federal courts the duty of resolving these technical questions concerning the construction and application of the local rent control remedy. The District Court, we submit, properly applied the available state law authorities, and the plain text of the Regulations, in holding plaintiff's complaint to fall within the rent control remedy and thus this action to be barred.

* We need not bother with fanciful hypotheticals, such as plaintiff's liquor store example (Ptf. brief, p. 9), involving conduct unrelated to the rent control remedy -- conduct neither relating to nor having any effect upon plaintiff's tenancy.

** Even plaintiff must concede the Administrator would have had jurisdiction over all the Madison defendants under Regulation §61(b), which extends to "any person" (see p. 26, supra). The Administrator likewise had jurisdiction to determine whether the rent control remedy applied to plaintiff's allegations against defendants.

POINT II

SUMMARY JUDGMENT ALSO WAS APPROPRIATELY GRANTED BECAUSE THE RECORD DEMONSTRATES THAT NONE OF DEFENDANTS' CONDUCT COULD REASONABLY BE HELD WRONGFUL TO PLAINTIFF

Rule 56 and plaintiff's failure to meet its burden

The purpose of the Rule 56 summary judgment procedure has been well stated as follows:

"Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial; it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists." Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940), quoted in 10 C. Wright & A. Miller, Federal Practice and Procedure, § 2712, pp. 383-84 (1973).

The Rule 56 procedure is especially appropriate here where, as in Rathborne I, "the merits in controversy have been fully explored in prior litigation between the same parties," Minnesota Mining & Mfg. Co. v. United States Rubber Co., 279 F.2d 409, 415 (4th Cir. 1960), and full discovery been afforded plaintiff (see p. 14, supra) on his claims. Miller v. Schweickart, 413 F.Supp. 1062, 1068-69 (S.D.N.Y. 1976) (Weinfeld, J.) (summary judgment granted after discovery, plaintiff's contentions concerning scienter and causation being found implausible).

In the defendants' moving papers under Rule 56, the baseless nature of plaintiff's allegations were demonstrated by (i) the detailed affidavit on personal knowledge by Mr. Glickman (A. 38-50), and (ii) by a specific and exhaustive marshalling of the record compiled during the extensive discovery conducted in Rathborne I (A. 51-92). In the face of this showing, plaintiff was not entitled to rest on his complaint and ask the District Court to indulge the futile hope that "something may turn up" to support his allegations at trial. Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 110 (2nd Cir. 1975). To avoid judgment he was required to set forth specific facts "such as would be admissible in evidence," "showing that there is a genuine issue of material fact for trial." Rule 56(e).^{*} But plaintiff chose to ignore his Rule 56 burden, demanded that his allegations "be accepted as proven" for purposes of the motion (Plf. brief, p. 4; A. 166), and came forward with no competent evidentiary showing that in fact they could be proven.

Instead, plaintiff produced the affidavit of his counsel annexed to which was a remarkable admixture of highly political, and totally inadmissible, magazine articles, news

^{*} Plaintiff had ample time to meet his Rule 56 burden. Not only had he been litigating his claim since 1972, but, in addition, the return date of defendants' motion was adjourned almost a year (from October 1975 to September 1976) in response to plaintiff's several requests (Record doc. 18-24).

clippings, press releases and correspondence (A. 171-95), which were, furthermore, cited out of context in a misleading manner (see A. 213-19). Such matters had no proper place in the record on a summary judgment motion. See generally, C. Wright & A. Miller, 10 Federal Practice and Procedure, § 2721, p. 473 (1973) (court may consider "material that would be admissible or usable at trial").

Plaintiff also submitted conclusory affidavits (A. 167-70) blaming the Madison defendants (or Odyssey House) for a whole host of social ills said to have occurred on the block -- "mysterious fires," congregations of male prostitutes and derelicts (see A. 217-19) -- but providing no basis for attributing such conditions to defendants, as distinguished from the poorly run methadone clinic (see p. 22, supra), or other causes. Such totally speculative innuendo, refuted by the record (see A. 79-84, 217-18), could not support a verdict against defendants and thus was not sufficient -- quite aside from its irrelevancy to plaintiff's tenancy -- to create a "genuine issue" sufficient to defeat this summary judgment motion. United States v. Mt. Vernon Milling Co., 345 F.2d 404, 407 (7th Cir. 1965) ("Intangible speculation does not raise an issue of material fact"); see, e.g., Williams v. McAllister Bros., Inc., 543 F.2d 19, 21 (2d Cir. 1976) (summary judgment properly awarded to avoid a "purposeless trial"); Atlantic States Constr. Co. v. Robert E. Lee & Co., 406 F.2d 827, 829 (4th Cir. 1969).

The actual conduct of
defendants: no
harassment of or
nuisance to plaintiff

True record shows that the only actions truthfully chargeable to the defendants were these: the policy of not re-renting vacant space; the placement of signs announcing that policy; the sealing of vacant buildings with tin; and the affording of free space to Odyssey House. Even plaintiff's counsel now purports to disbelieve that such innocuous activities "constituted harassment" as alleged (Plf. brief, p. 12). But his new label of "nuisance"* adds no substance to the complaint.

In the first place, plaintiff, a tenant whose only right to possession derived from the rent control statutes, may not maintain an action for nuisance at all. Nuisance lies only for violation of a property right -- "a disturbance of rights in land." W. Prosser, Torts, 594 (3d ed. 1964). As a rent control tenant, plaintiff had no property right to be injured, but rather only a statutory right to the protection of which plaintiff must look to the statutes

* In the District Court plaintiff also suggested that such other labels as "conspiracy" and "prima facie tort" might apply to the alleged wrong. Since plaintiff has abandoned these labels on this appeal we need not demonstrate their inapplicability.

which created it.* See, e.g., Drinkhouse v. Parka Corp., 3 N.Y.2d 82, 89 (1957) (a statutory tenant has no property right or estate); Barbee v. 2639 Corp., 284 App. Div. 298 (1st Dep't. 1954). As we have shown, those statutes indeed did provide a remedy for plaintiff's alleged wrong but he failed to pursue it (see pp. 24-37, supra).

Secondly, in any event no reasonable fact finder could conclude that any of the activities of the Madison defendants constituted the substantial interference with the tenancy of plaintiff necessary to create an actionable nuisance. See Sterling National Bank & Trust Co. v. Fidelity Mortgage Investors, 510 F.2d 870, 875 (2d Cir. 1975) (summary judgment proper where record raised no competing material inference on which "reasonable minds" might disagree). The doctrine of nuisance does not afford protection to the hypersensitive or paranoid individual, as plaintiff had become as a result of his bitter disputes with Garfinkel and Munchtime (see pp. 9-12, supra). Rather, the cause of action here may be sustained only if it can reasonably be found that a "normal person in the community" residing in plaintiff's apartment would have found the activities to have constituted a "substantial interference" with the tenancy. See generally, W. Prosser,

* The few cases cited by plaintiff for the right of a tenant to maintain an action for nuisance (Plf. brief, p. 16) do not involve statutory tenants but, rather, tenants having property rights based in an existing lease.

T 598-99 (3d ed. 1964). As the New York Court of Appeals has observed:

"Trifling results are disregarded, for the courts proceed with great caution and will not interfere with the use of property by the owner thereof unless such use is unreasonable, the injury material and actual, not fanciful or sentimental." McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 49 (1907).

As to the few signs posted on other buildings in plaintiff's block (see pp. 19-20, supra), the allegation is "trifling" on its face. The signs could not possibly have disturbed plaintiff when he knew -- or is charged with knowing -- that they did not relate to him or his building. The policy of not re-renting vacant space announced by the signs was defendants' privilege as the owners of that space -- so long as they properly secured the vacant buildings. It was the only economically sensible policy given the planned redevelopment (A. 44).

The allegation concerning the tinning of vacant buildings is equally nonsense. The tinning was necessary to comply with section C26-80.0 of the Administrative Code (see p. 21, supra), as well as to avoid possible creation of a nuisance.*

* In Puritan Holding Co. v. Holloschitz, 82 Misc.2d 905, 907 (Sup. Ct. N.Y. Co. 1975), an owner's failure to comply with section C26-80.0, with the result that its abandoned vacant building had "deteriorated," become "unsightly" and been "taken over by derelicts," was the basis for a judgment in nuisance against the owner.

There is no basis for the characterization of tinning as "the most hideous of the procedures allowed by §C26-80.0. . . ." (Ptf. brief, p. 17). Would plaintiff have preferred wood or brick to tin? Nor is any reason given to hold tortious the Madison defendants' common sense decision not to use the much more expensive option permitted by the Code of having each of their vacant buildings "continuously guarded."

--Odyssey House: as a matter
of law, not a nuisance per se

Under New York law, the Odyssey House facilities could be found to be a nuisance only on one of two showings: (1) that their intrinsic nature was so incompatible with plaintiff's tenancy that the mere act of placing them on the block constituted creation of an "absolute nuisance," or nuisance "per se," i.e., that the facilities were a nuisance no matter how carefully supervised or operated; or (2) that although not a nuisance per se, the Odyssey House facilities became a nuisance to plaintiff by some negligence in the manner in which they were operated. See Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312 (1971); People v. HST Meth, Inc., 43 App. Div. 2d 932 (1st Dep't. 1974). The District Court properly found that plaintiff could prevail on neither theory against the Madison defendants.

A finding that a use is a nuisance per se has extreme consequences, for it means that the use must

be absolutely prohibited -- even though permitted by the zoning and building laws, as were Odyssey House's facilities on the block -- from the neighborhood in question or any similar neighborhoods. E.g., Nesin v. Long Island Granite Co., 205 Misc. 765 (Sup. Ct. Queens Co. 1954). Here, such a finding would mean that Odyssey House facilities could be excluded by an injunction, even before setting up operations, from any of the residential areas in New York City similar to the block in question. See Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312 (1971).

A finding of nuisance per se is unavailable, as a matter of law, with respect to charitable uses which further the public policy of the state, and Odyssey House's drug rehabilitation facilities are such a use (see pp. 21-22, supra). The courts have held that such uses are not to be classified as nuisances per se for they can be operated in a manner compatible with residential neighborhoods. Slevin v. Long Island Jewish Medical Center, 66 Misc. 2d 312 (1971) (drug treatment center); see Heaton v. Packer, 131 App. Div. 812 (1st Dep't 1909) (insane asylum); Pilling v. Davison, 30 N.Y.S.2d 97 (Sup. Ct. Nass. Co. 1941), aff'd, 264 App. Div. 737 (2nd Dep't 1942) (insane asylum); Keenly v. McCarty, 137 Misc. 524 (Sup. Ct. Onondaga Co. 1930) (hospital treating alcoholic, insane and drug-addicted patients).*

* See generally Annot., Institution for the Punishment or Rehabilitation of Criminals, Delinquents, or Alcoholics as Enjoinable Nuisance, 21 A.L.R. 3d 1058 (1968).

--plaintiff cannot show that
Odyssey House was operated
in an improper manner

The record also demonstrates that no nuisance to plaintiff was created by reason of any improper operation of the Odyssey House facilities. The showing by the Madison defendants that the Odyssey House facilities were operated in an exemplary manner -- based on specific competent evidence, and especially on the discovery of Odyssey House by plaintiff in Rathborne I -- stands uncontradicted by admissible, competent evidence (see pp. 22-23, supra).^{*} Plaintiff's speculative innuendo blaming Odyssey House for alleged conditions on the block is equally without a basis in the record (see pp. 39-40, supra).

--plaintiff's failure to give the
Madison defendants notice of his
Odyssey House grievances bars his
claim here

Even if there were an evidentiary basis for
plaintiff's complaints about Odyssey House's operations,

^{*} People v. HST Meth, Inc., 43 App.Div.2d 932 (1st Dep't 1974), illustrates the type of factual showing necessary to sustain a finding that a drug treatment facility (here a methadone clinic) constitutes a nuisance because of its lax methods of operation. An injunction was obtained -- and that only against the clinic's lax methods, not against the clinic itself -- based on evidence which included a detailed report of a police investigation demonstrating such matters as illegal drug traffic on the premises and repeated ambulance calls to the premises by reason of drug overdoses. In contrast, several other clinics in the same general neighborhood -- Park Avenue and East 88th Street, at least as fashionable as the block on which plaintiff resided -- "were operating without major difficulties or complaints of any consequence" (43 App.Div. at 933), again showing the inappropriateness of labelling such facilities as nuisances per se.

plaintiff could not assert a claim against the Madison defendants because he never gave them notice of his complaints, as he has admitted, after he vacated (see p. 12, supra).*

It is the established rule in New York that owners of buildings (such as the Madison defendants) are not liable for a nuisance created by the lessee or tenant in possession (such as Odyssey House) unless they had notice of the existence of the nuisance:

"A party, having no knowledge or notice of the existence of an evil, cannot reform it; and he consequently cannot be chargeable with a fault or a wrong for not doing it; nor can he, under such circumstances be said to uphold a nuisance, or be waiting to be admonished to reform it. Such conduct implies a willing, and not merely an involuntary, acquiescence in the continuance of the wrongful act. [Thus] . . . the rule requiring notice is proper and should be adopted."
Conhocton Stone Road v. Buffalo, N.Y. and Erie R.R., 51 N.Y. 573, 581 (1873).

* The Madison defendants and Odyssey House also received no such complaint from any other source (A. 47-48, 82). The belated claim of counsel -- not made in the District Court -- that plaintiff gave notice as a member of the East Fifties Association (Ptf. brief, p. 16) is baseless. The record neither supports the claim that plaintiff was a member of that Association -- much less that he helped organize it! (Ptf. brief, p.4) -- nor that the Association gave any notice to defendants of the matters of which plaintiff now complains. The political controversy over the proposed redevelopment project -- if that is what plaintiff's news clippings are supposed to demonstrate -- provided no notice that plaintiff felt himself harassed, nuisanced or otherwise damaged by Odyssey House or the assemblage.

See, e.g., Timlin v. Standard Oil Co., 126 N.Y. 514 (1891); Dickson v. New York Trap Rock Corp., 293 N.Y. 509, 514 (1944); McCloskey v. Buckley, 223 N.Y. 187 (1918); Greiner v. Syracuse, 228 App. Div. 566 (4th Dep't 1930), aff'd, 256 N.Y. 688 (1931). See also Restatement of Torts §837 (1939).*

Thus, New York law requires, consistent with common sense, that a would be plaintiff must ask defendants to "stop it" before he seeks to recover millions of dollars in damages by reason of the continuation of an objectionable activity -- not a nuisance per se -- which the defendants could have corrected had they been notified of plaintiff's complaint. Since the plaintiff here, however, gave defendants no notice he was being subjected to any abusive incidents or conditions -- if he was -- defendants had no opportunity to

* Similarly in constructive eviction actions, analogous to plaintiff's complaint here, a landlord is not liable for conditions or conduct interfering with the peaceful occupancy of a tenant unless the landlord was given notice of and failed to cure the offending conditions or conduct. Compare Leo v. Santagada, 45 Misc. 2d 309, 311 (Newburg City Ct. 1964) (no constructive eviction since tenants failed to notify landlord of cockroach problem "to afford him an opportunity to remedy the situation"), with Rockrose Assoc. v. Peters, 81 Misc.2d 971 (Civil Ct. N.Y. Co. 1975) (constructive eviction where landlord failed to abate noise from neighboring apartment of which tenant had "repeatedly complained"). Compare Manhattan Leasing Co. v. Schleicher, 142 N.Y.S. 545 (Sup. Ct. App. T. 1st Dep't 1913) (no constructive eviction where employee on one occasion insulted tenant), with Purcell v. Leon, 83 Misc. 5 (Sup. Ct. App. T. 1st Dep't 1913) (constructive eviction where janitor was abusive toward tenant and landlord upheld his conduct and failed to discharge him after a "reasonable opportunity" to do so).

correct the situation, either by demanding that Odyssey House better supervise its residents or else by removing Odyssey House from the facilities they occupied. Further, there was more here than a simple failure to give notice: there was a conscious decision by plaintiff to withhold notice at his meeting with Mr. Glickman, from which silence defendants reasonably were entitled to assume that plaintiff consented to Odyssey House's facilities. Thus, plaintiff cannot now sue for any "harassment" or "nuisance" premised on defendants' failure to cure alleged improper activities or conditions created by Odyssey House, notice of which he consciously withheld from defendants. See Ragnar Benson, Inc. v. Kassab, 325 F.2d 591, 595-96 (3d Cir. 1963) (directed verdict against plaintiff since plaintiff "chose instead to remain silent" about the alleged wrong during conference with defendant "at a time when [defendant] was in a position to have averted the wrong"); cf. Zaccaro v. Congregation Tifereth Israel, 20 N.Y.2d 77 (1967) (injunction against use denied where no objection had been made to the use for many years); American Electronics, Inc. v. Christo Poulos & Co., 43 Misc.2d 302, 307 (Sup.Ct. Kings Co. 1964) ("avoidable" damage cannot be the basis of a suit in nuisance); W. Prosser, Torts 412 (3rd ed. 1964). See also Restatement of Torts 2d, §892(2) and §892A(1), and Comment c (Tent. Draft No. 18, 1972) (plaintiff barred from tort claim based on conduct to which his silence or inaction was reasonably understood as consent).

Plaintiff concludes his brief by urging (Ptf. brief, p. 20) that his inflated damage claims are the "last hope" to deter future harassment of tenants by assemblers, such as plaintiff alleges occurred here. But the established applicability to just such conduct of the rent control remedy plaintiff so consciously evaded (see pp. 12-14, supra) is the obvious answer to this postering.

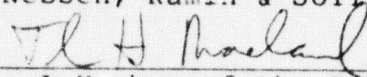
Conclusion

For the reasons stated above, defendants-appellees Edwin J. Glickman, Salbian Realty Co., Inc., Siltan Development Corp., and Madison Associates respectfully request the Court to affirm the judgment below and to award them the costs of this appeal.

Respectfully submitted,

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MARCH 25, 1977

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